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Reporter's Shield Laws: Status of the Legislative Testimonial Privilege;Note

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REPORTER'S SHIELD LAWS: STATUS OF THE LEGISLATIVE TESTIMONIAL PRIVILEGE

The recent, much-publicized imprisonment of New York Times reporter Myron Farber[1] has brought renewed attention to the struggle of journalists to keep their confidential sources secret in response to judicial subpoenas. Often choosing fines and jail over disclosure,[2] newsmen have contended that in order to effectively carry out their media function they must be privileged from divulging their news informants in all legal proceedings.

Into this fray, on the side of journalists, have entered a majority of state legislatures as well as many Congressmen.[3] They have endeavored to offer statutory protection—so-called "shield laws"[4]—which would exempt reporters[5] from having to testify as to their confidential sources. In spite of being protected by these statutes, however, Farber and other journalists have found themselves facing contempt citations for refusing to reveal information supposedly privileged in their states.[6]

1. State v. Jascalevich, 158 N.J. Super. 488, 386 A.2d 466 *aff'd sub nom, In re* Myron Farber, 78 N.J. 259, 394 A.2d 330, *cert. denied,* 47 U.S.L.W. 3369 (1978) [hereinafter cited as *Farber*]. Farber was fined $1,000 and sentenced to jail on criminal and civil contempt charges for refusing to turn over notes relating to his sources in response to a subpoena duces tecum in a New Jersey murder trial. In addition, his employer, the *New York Times,* was fined $100,000 plus $5,000 a day until the material was handed over. Farber was eventually released upon the defendant's acquittal after spending 40 days in confinement and the *New York Times* ended up paying $285,000 in fines.
2. Since 1972 over 40 reporters have been held in contempt of court for refusing to divulge their sources, and more than 12 have gone to jail. *Newsweek,* August 7, 1978, at 87.
3. Although Congress has yet to enact a federal shield law privileging a reporter's relationship with his source, such legislation has been periodically introduced since 1929. Some proposals would have created a uniform national shield statute for journalists by extending any federal evidentiary legislation to be applicable to state proceedings as well, either on the basis of congressional power to regulate interstate commerce or through Congress' enforcement clause authority in the fourteenth amendment in conjunction with the first amendment. In the meantime, newsmen have achieved some success on the federal level with the Justice Department guidelines which require negotiation with the news media and the express approval of the Attorney General before department personnel may seek a subpoena of a reporter's confidential sources. 28 C.F.R. § 50.10 (1976).

   Federal privilege legislation came closest to fruition in the aftermath of the Supreme Court's denying newsmen a constitutional testimonial privilege in Branzburg v. Hayes, 408 U.S. 665 (1972). Both the House of Representatives and the Senate held extensive hearings on a newsman's privilege, ultimately studying, in the process, over 100 separate shield bills, but Congress' inability to agree on the form or scope of a shield statute kept legislation from leaving committee. *See generally, Hearings on H.R. 837 Before Subcomm. No. 3 of the House Comm. on the Judiciary,* 92d Cong., 2d Sess. (1972); *Hearings on H.R. 717 Before Subcomm. No. 3 of the House Comm. on the Judiciary,* 93d Congress, 1st Sess. (1973); and *Hearings on S. 36 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary,* 93d Congress, 1st Sess., at 9 (1973). The House reconvened another committee on the subject in 1975, but again with no substantive results. *Hearings on H.R. 215 Before Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary,* 94th Cong., 1st Sess. (1975). The Farber court's invalidation of New Jersey's shield statute has renewed congressional interest in the passage of a federal shield law. Two bills creating a federal privilege were introduced in the closing days of the 95th Congress in 1978, but because of their late introduction, neither got beyond the hearing stage. The Constitution Subcommittee of the Senate is presently conducting hearings on the issue in the current session of Congress, however, and has several proposed shield bills under consideration. Numerous collateral shield statutes have also been introduced which would protect against police searches of newspaper offices for confidential notes and materials, a practice recently validated by the Supreme Court in Zurcher v. Stanford Daily, 436 U.S. 547 (1978).
4. The term "shield law" is commonly applied to statutes granting members of the news media the privilege of declining to reveal their confidential sources and information in administrative, legislative, and judicial proceedings.
5. The terms "reporters," "newsmen," and "journalists" are only generic shorthand devices used interchangeably to describe any person who disseminates news and information to the public. They are used to signify news media personnel in general, and are not meant to imply limitation solely to the print media.
6. *See, e.g.,* Farber, 78 N.J. at 270, 394 A.2d at 335. The New Jersey Supreme Court expressly acknowledged that Farber came fully within the literal language of New Jersey's shield law.

These occurrences raise serious questions as to the ability of legislatures to grant newsmen an evidentiary privilege against compulsory disclosure of their sources in legal forums. Specifically, to what extent are legislative shield laws able to provide the testimonial privilege sought by journalists? Do present shield statutes actually afford newsmen much protection?

This note will explore these issues through an analysis of the various reporters' shield laws presently in force. It will review the type and scope of privilege they offer and their effectiveness in providing newsmen with a testimonial privilege against compelled disclosure of confidential sources. Next, this note will examine the judiciary's response to newsmens' privilege legislation. Finally, it will attempt to ascertain what the future may hold for shield law legislation in light of past and present state and federal court rulings.

A TESTIMONIAL PRIVILEGE FOR REPORTERS: A BRIEF HISTORY

Newsmen have long and persistently asserted a testimonial privilege protecting the confidentiality of their news source relationships from compulsory disclosure. Traditionally concerned that the widespread use of confidential informants[7] would be seriously disrupted by disclosure, journalists as far back as 1848 resisted Congressional and judicial efforts to elicit their sources of news stories.[8] Initially, recognition of a common law privilege[9] analogous to that of the attorney-client or government-informant[10] was sought; however, this approach found almost universal judicial rejection.[11] Other early arguments advanced for a testimonial privilege—that disclosure of sources contravened the journalistic code of ethics, violated newspaper employer's regulations, or caused forfeiture of employment and estate—met a similar fate.[12] Some subsequent success in refusing to divulge confidential sources was achieved by various reporters on fifth amendment grounds,[13] but this basis for a privilege did not permit widespread use, since before granting it, courts usually required some substantiation of the self-incrimination which would result from the revelation of sources.[14]

7. This is particularly true in investigative reporting. Murasky, *The Journalist's Privilege: Branzburg and Its Aftermath,* 52 Texas L. Rev. 829, 830 (1974).
8. *Ex parte* Nugent, 18 F. Cas. 471 (No. 10, 375) (D.C. Cir. 1848). Nugent's incarceration by the Senate for refusing to reveal his sources is thought to be the first reported newsman's privilege case in the United States. Comment, *The Newsman's Privilege After Branzburg: The Case for a Federal Shield Law,* 24 U.C.L.A. L. Rev. 160, 161 (1976).
9. Common law recognized four relationships which, because of public interest, gave rise to privileged communications: attorney-client, husband-wife, government-informant, juror-juror. In addition, two others, physician-patient and clergyman-penitent, have received almost universal statutory implementation. Comment, *Chipping Away at the First Amendment: Newspapermen Must Disclose Sources,* 7 Akron L. Rev. 129 (1973).
10. The informer's privilege is perhaps the closest analogy to the newsman's privilege, because in other privileges it is the "communication" which is privileged, while in the case of the government and the informant the identity of the "source" is protected. The analogy is bolstered by the fact that both privileges are justified on the presumption that without them, valuable information would be lost to society. Note, however, that the government-informant privilege is not absolute; law enforcement officials must reveal confidential informants when the defendant otherwise would not be afforded a fair trial as guaranteed under the Constitution. *See* Roviaro v. United States, 353 U.S. 53 (1957); McCray v. Illinois, 386 U.S. 300 (1967). The informer's privilege, however, is not founded on a constitutional guarantee.
11. The leading case is People v. Sheriff, 268 N.Y. 582, 199 N.E. 415 (Ct. App. 1936), in which the court refused to recognize a common law privilege for reporters. *See also, e.g.,* Adams v. Associated Press, 46 F.R.D. 439 (S.D. Tex. 1969), in which the court denied the assertion of a common law privilege on the grounds that no common law privilege for reporters had ever been recognized.
12. Comment, *Tennessee Grants Newsmen a Qualified Disclosure Shield,* 4 Memphis St. U. L. Rev. 143, 145 (1973).
13. "No person shall be . . . compelled in any criminal case to be a witness against himself . . . ", U.S. Const. amend. V.
14. *See, e.g.,* Elwell v. United States, 275 F. 775 (7th Cir. 1921), *appeal dismissed,* 263 U.S. 676 (1923).

Concerned about the lack of protection given a journalist from forced disclosure of his confidential sources, legislatures began to offer journalists statutory assistance in the form of shield laws which privileged, to various degrees, the news source relationship. Enactments were slow in coming, however, with only a dozen states prior to 1964 actually passing shield statutes.[15] Because of the limited availability of such statutes and uneven protection they provided, reporters opted to concentrate on obtaining a constitutional privilege of nondisclosure based on the cornerstone of their profession, the first amendment.[16] Journalists contended that disclosure of their confidential sources or information[17] would have a "chilling effect" and cause their informants to dry up, thus significantly impairing journalists' ability to gather and report the news.[18] In turn, this would place an impermissible burden on public access to the free flow of information, news, and ideas in violation of a public right founded on the first amendment's interest in a vigorous and relatively unencumbered press.[19] Hence, the constitutional testimentary privilege asserted was not for newsmen personally, but ultimately for the benefit of the public.[20]

From the outset, courts rejected the contention of an absolute first amendment privilege,[21] holding that no right or liberty, including freedom of the press, was absolute, while the public had an overriding right to every man's evidence in order to identify and punish wrongdoers. Some courts did recognize a qualified constitutional privilege, however, holding that the fair, effective, and orderly administration of justice only necessitated impairment of the first amendment freedoms, and hence a duty to testify, when the disclosure of a newsman's confidential sources "went to the heart of the plaintiff's claim."[22] For a decade and a half the subject remained unsettled.[23]

15. Alabama, Arizona, Arkansas, California, Indiana, Kentucky, Maryland, Michigan, Montana, New Jersey, Ohio, and Pennsylvania.
16. "Congress shall make no law . . . abridging the freedom . . . of the press . . . ", U.S. Const. amend. I.
17. With the groundwork for news stories increasingly being laid with off-the-record information, newsmen have sought to have the substance of confidential communications also included within the testimonial privilege accorded them.
18. *E.g.*, Note, *A Study in Governmental Separation of Powers: Judicial Response to State Shield Laws*, 66 Geo. L.J. 1273 (1978); 24 U.C.L.A. L. Rev., *supra* note 8, at 161. For statistical studies of the chilling effect, *see, e.g.*, Blasi, *The Newsman's Privilege: An Empirical Study*, 70 Mich. L. Rev. 229 (1971); Guest and Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 Nw. U.L. Rev. 18 (1969). *See also, Hearings on S. 36, supra* note 3, at 9 (statement by Walter Cronkite).
19. Associated Press v. United States, 326 U.S. 1 (1945). The Court held that the first amendment rests on the assumption that the widest possible dissemination of information is essential to the public welfare.
20. U.S. v. Steelhammer, 539 F.2d 373 (4th Cir. 1976). It has particularly been contended that with the widespread classification of governmental information and restraints on governmental spokesmen, discouraging inside informers would substantially jeopardize the public's ability to know about the government and its institutions, thus jeopardizing the very essence of intelligent self-government. *See, e.g., Hearings on S. 36, supra* note 3, at 6 (statement of Senators Sam J. Ervin, Jr., Chairman).

    Note, however, that unlike other privileges, the newsman's privilege is not that of the informant but personal to the journalist. Only the reporter can invoke it, and he may waive the privilege and disclose his confidential sources and information regardless of the wishes of the informant. *See, e.g.*, Lipps v. State, 254 Ind. 141, 258 N.E. 2d 622 (1970); Hestand v. State, 257 Ind. 191, 273 N.E. 2d 622 (1971); Beecroft v. Point Pleasant Printing & Pub. Co., 82 N.J. Super. 269, 197 A.2d 416 (1964); Lightman v. State, 15 Md. App. 713, 294 A.2d 149, *aff'd* 266 Md. 550, 295 A.2d 212 (1972), *cert. denied*, 411 U.S. 951 (1973), Mont. Rev. Codes § 93-601-2 (Supp. 1977).
21. *See* Garland v. Torre, 259 F.2d 545 (2d Cir. 1958), *cert. denied*, 358 U.S. 910 (1958).
22. *Id.* at 550.
23. A majority of courts refuse to grant newsmen a privilege in any form. 24 U.C.L.A. L. Rev., *supra* note 8, at 170. Additionally, the Supreme Court declined to hear the issue on a number of occasions. However, the 1964 decision of New York Times v. Sullivan, 376 U.S. 254 (1964), concerning libel recoveries, indicated that conduct tending to restrain the flow of news would be presumed unconstitutional unless strongly justified. This seemed to support the idea of at least a qualified testimonial privilege being available to the media under the first amendment.

The Supreme Court finally addressed the question of a newsman's constitutional right to protect the confidentiality of his source in 1972 in *Branzburg v. Hayes*[24] and yielded four different judicial opinions on the issue. Five justices held that newsmen had no privilege under the first amendment to keep the identity of news informants confidential, at least when properly subpoenaed before a grand jury conducting a criminal investigation.[25] Justice White, writing for the majority, did acknowledge, however, that newsgathering was protected by the first amendment,[26] but held that the effect on newsgathering of forcing journalists to reveal confidential sources was speculative in contrast to the paramount public interest in law enforcement and effective grand jury proceedings.[27] The majority stressed, however, that its decision did not preclude Congress or state legislatures from creating a privilege for journalists, nor did it prevent state courts from construing their own constitutions so as to recognize a privilege.[28]

Justice Powell's pivotal concurring opinion, emphasized the "limited nature" of the court's holding[29] and that first amendment privilege claims must be weighed with other constitutional and societal interests individually "on a case by case basis."[30] Three of the four dissenters, led by Justice Stewart, would have recognized a limited evidentiary privilege of nondisclosure under the first amendment,[31] while Justice Douglas argued that the first amendment granted reporters an absolute testimonial privilege.[32]

The *Branzburg* decision took on special significance for legislators. The court had left an overt invitation for legislatures to determine for themselves the desirability and necessity of newsmen having a testimonial privilege. Without a common law or constitutional privilege against compulsory disclosure of news sources, whatever statutory protection legislatures provided remained as the only effective and viable alternative on which newsmen could base a significant testimonial privilege. Consequently, in the wake of *Branzburg,* state legislatures hastened to put shield laws on the books or to strengthen existing statutes.

24. 408 U.S. 665 (1972), hereinafter referred to as Branzburg. The decision actually involved three separate cases consolidated on appeal, Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970), *rev'd,* 408 U.S. 665 (1972); Branzburg v. Pound, 461 S.W.2d 345 (Ky. 1971), *aff'd,* 408 U.S. 665 (1972); and *In re* Pappas, 358 Mass. 604, 266 N.E. 2d 197 (1971), *aff'd,* 408 U.S. 665 (1972).
25. *Id.* at 690-691.
26. *Id.* at 707.
27. *Id.* at 690.
28. "At the federal level, Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to address the evil discerned and, equally important, to refashion those rules as experience from time to time may dictate. There is also merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards in light of the conditions and problems with respect to the relations between law enforcement officials and press in their own areas. It goes without saying, of course, that we are powerless to enact any bar to state courts responding in their own way and construing their own constitutions so as to recognize a newsman's privilege, either qualified or absolute." *Id.* at 706.
29. *Id.* at 709.
30. *Id.* at 710.
31. The dissent held that in balancing the interests of the first amendment with the public function of the grand jury, the first amendment would prevail unless the government could: "(1) show that there is probable cause to believe that the newsman has information which is clearly relevant to a specific probable violation of law; (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of first amendment rights; and (3) demonstrate a compelling and overriding interest in the information." *Id.* at 743.
32. *Id.* at 712.

STATE SHIELD LAWS

To date, 26 states have enacted some type of statutory shield granting newsmen a testimonial privilege against disclosure of their confidential sources, although one state's statute is no longer in effect.[33] The first shield law was enacted by Maryland in 1896. The last seven shield statutes were implemented within two years following the *Branzburg* decision.[34] Under such titles as Reporters' Privilege Act,[35] Reporters' Confidence Act,[36] and Free Flow of Information Act,[37] these 26 state legislatures have determined that in balancing the societal interest in the availability of information with the public and private interest in the just punishment of wrong-doing, "the news media should have the benefit of a substantial privilege not to reveal sources of information or to disclose unpublished information."[38] Unfortunately, disagreement as to the extent of that protection has resulted in wide differences in shield law provisions and terminology.[39] No two states have identical statutes privileging the identity of a newsman's confidential source. These statutes can be compared, however, by examining the persons privileged, the nature of the material privileged, and the scope of the privilege given.

Persons Privileged

To effectively include newsmen within their provisions, shield laws must attempt to specify the numerous individuals working in various capacities in a wide range of media, who gather and disseminate news and information to the public. Unfortunately, unlike lawyers and doctors who have also been granted statutory privileges, journalists are not licensed by the state, so no easy method is available for defining the class to which the privilege is to be accorded. Thus, legislatures have had to explicitly define both the media and the personnel within those media who are embraced by their statutory testimonial privileges.

33. Ala. Code tit. 12, § 12-21-142 (1977); Alaska Stat. §§ 09.25.150-.220 (1973); Ariz. Rev. Stat. Ann. § 12-2237 (West Supp. 1978); Ark. Stat. Ann. § 43-917 (1977); Cal. Evid. Code § 1070 (West Supp. 1979); Del. Code Ann. tit. 10, §§ 4320-26 (1975); Ill. Ann. Stat. ch. 51, §§ 111-119 (Smith-Hurd Supp. 1978); Ind. Code Ann. § 34-3-5-1 (Burns Supp. 1978); Ky. Rev. Stat. § 421.100 (1978); La. Rev. Stat. Ann. §§ 45:1451-54 (West Supp. 1978); Md. Cts. & Jud. Proc. Code Ann. § 9-112 (1974); Mich. Comp. Laws Ann. § 767.5a (1968); Minn. Stat. Ann. §§ 595.021-.025 (West Supp. 1978); Mont. Rev. Codes Ann. §§ 93-601-1, 2 (1964 and Supp. 1977); Neb. Rev. Stat. §§ 20-144 to 147 (1977); Nev. Rev. Stat. § 49.275 (1977); N.J. Stat. Ann. §§ 2A:84A-21, 21a, 29 (West 1976 and Supp. 1978); N.Y. Civ. Rights Law § 79-h (McKinney 1976); N.D. Cent. Code § 31-01-06.2 (1976); Ohio Rev. Code Ann. §§ 2739.04, .11, .12 (1954 and Page Supp. 1979); Okla. Stat. Ann. tit. 12, § 2506 (West Supp. 1978); Or. Rev. Stat. §§ 44.510-.540 (1977); Pa. Stat. Ann. tit. 42, § 5942 (Purdon 1978); R.I. Gen. Laws §§ 9-19.1-1 to 3 (Supp. 1979); Tenn. Code Ann. § 24-113 to 115 (Supp. 1978). N.M. Stat. Ann. § 20-1-12.1 (1953 Comp.), 1967 N.M. Laws, was declared unconstitutional in Ammerman v. Hubbard Broadcasting, Inc., 89 N.M. 307, 551 P.2d 1354 (1976) and subsequently dropped from statute books when they were recodified in 1978.

For an excellent summary of newsman's privilege legislation, see Council of State Governments, Shield Laws, (1973).

34. Delaware, Minnesota, Nebraska, North Dakota, Oklahoma, Oregon and Tennessee. It should be noted that 19 states had enacted shield laws at the time of the Branzburg decision, not 17 as stated in the court's opinion. 408 U.S. at 689. This error, which excluded the Illinois and Rhode Island statutes passed in 1971, has been incorrectly cited again in numerous articles. *See, e.g.,* 66 Geo. L.J., *supra* note 18, at 1274.
35. Del. Code Ann. tit. 10, §§ 4320-26 (1975).
36. Mont. Rev. Codes Ann. §§ 93-601-1,2 (1964 and Supp. 1977).
37. Minn. Stat. Ann. §§ 595.021-.025 (West Supp. 1978) and Neb. Rev. Stat. §§ 20-144 to 147 (1977).
38. Minn. Stat. Ann. § 595.022 (West Supp. 1978).
39. Variations in shield laws result as much from the respective age of the statutes as from differing policy considerations.

1. Media Requirements

In demarcating the media included within their statutory provisions, most of the 25 states presently offering statutory shields have recognized the wide range of media by which information and news are conveyed to the public.[40] Oregon is a good example. Its statute covers any "medium of communication" which "includes, but is not limited to, any newspaper, magazine or other periodical, book, pamphlet, news service, wire service, news or feature syndicate, broadcast station or network, or cable television system."[41] Other states, concerned that even such extensive listings of media may prove too limiting, use all-inclusive terms for the media within their statutory protection. For example, Delaware protects any media which has "facilities for the mass reproduction of words, sounds, or images in a form available to the general public."[42] Some states have enacted stricter requirements for statutory coverage. Nine states restrict their testimonial privilege to the established press, as opposed to the underground press, by including language within their statutes to the effect that newspapers and periodicals "must be issued at regular intervals and have a paid general circulation."[43] New York, New Jersey, Ohio and Pennsylvania stipulate even more rigid formalities in their statutes.[44]

2. Occupational Requirements

The various state shield laws also restrict the individuals protected within each medium. One approach used by many states is to define the relationship between the media and the persons privileged. Alabama follows this format. It states, "No person engaged in, connected with, or employed by any [stipulated

40. 23 of the 25 states include the traditional broadcast and print media within their statutes - newspapers, radio stations, and television. Ala. Code tit. 12, § 12-21-142 (1977), Ariz. Rev. Stat. Ann. § 12-2237 (West Supp. 1978), and Ky. Rev. Stat. § 421.100 (1978) restrict protection exclusively to these traditional media, while the 21 other states include at least journals or periodicals as well. Ark. Stat. Ann. § 43-917 (1977) and Mich. Comp. Laws Ann. § 767.5a (1968) are unique: Arkansas includes newspapers, periodicals, and radio stations within the ambit of its statute, but excludes television stations, while Michigan only provides for "reporters of newspapers and other publications", both indicating the antiquity of their statutes in this age of the electronic media.

41. Or. Rev. Stat. §§ 44.510 (1977).

42. Del. Code Ann. tit. 10, § 4320 (1975). Minn. Stat. Ann. § 595.023 (West Supp. 1978) includes media "for the purposes of transmission, dissemination or publication to the public." Tenn. Code Ann. § 24-113 (Supp. 1978) says only "news media or press." N.D. Cent. Code § 31-01-06.2 (1976) includes "any organization engaged in publishing or broadcasting news." N.J. Stat. Ann. § 2A:84A-21 (West Supp. 1978) grants protection to any media "for the purpose of gathering, procuring, transmitting, compiling, editing or disseminating of news for the general public."

43. Alaska, Illinois, Indiana, Louisiana, New Jersey, New York, Ohio, Pennsylvania and Rhode Island. Pa. Stat. Ann. tit. 42, § 5942 (Purdon 1978) requires only "general circulation." Alaska Stat. § 09.25.150 (1973) and Ind. Code Ann. § 34-3-5-1 (Burns Supp. 1978) do not require a "paid" general circulation. Ohio Rev. Code Ann. § 2739.11 (Page 1954) only stipulates that newspapers have been sold or offered for sale.

Apparently the rationale is that the professional press is primarily responsible for the continuing process of procurement and dispersement of conventional news to the public and therefore the privilege should be restricted to them.

44. N.Y. Civ. Rights Law § 79-h (McKinney 1976) and N.J. Stat. Ann. § 2A:84A-21a (West Supp. 1978) state "'Newspaper' shall mean a paper that is printed and distributed ordinarily not less frequently than once a week, and has done so for at least one year, and that contains news, articles of opinion (as editorials), features, advertising, or other matter regarded as of current interest, has a paid circulation and has been entered at United States post-office as second-class matter."

Circulation requirements that are too arbitrary may be repugnant to the Equal Protection Clause of the Constitution. *See* D'Alemberte, *supra* note 12, at 225.

N.J. Stat. Ann. § 2A:84A-21 (West Supp. 1978), Ohio Rev. Code Ann. § 2739.04 (Page Supp. 1979), and Pa. Stat. Ann. tit. 42, § 5942 (Purdon 1978) also require the broadcast media to maintain for public inspection a record of the information whose source they wish to privilege. This provision, though, appears to be aimed more at guaranteeing access to previously broadcast information than attempting to limit the media covered.

media] . . . shall be compelled to disclose . . . "[45] Other states simply list the individuals protected under the statute. The Oklahoma statute provides, "any man or woman who is a reporter, photographer, editor, commentator, journalist, correspondent, announcer, or other individual regularly engaged in . . . preparing news," is within its ambit.[46] A third method is to specify the functions of the persons covered by the statute. Illinois uses the following approach: "Reporter means any person regularly engaged in the business of collecting, writing or editing news for publication through a news medium; and includes any person who was a reporter at the time the information sought was procured or obtained."[47]

Illinois' definition, cited above, also includes former newsmen. Eleven other states also indicate that their statutory protection derives from the individual's employment at the time the information is provided by confidential sources, rather than at the time of the requested disclosure.[48] Also, although most states require that a reporter be regularly engaged in newsgathering to qualify for the privilege, Tennessee and Indiana have drafted their statutory provisions to explicitly include independent freelance reporters who might collect or disseminate information through a media.[49]

An additional concern of some states is that shield laws will be used to conceal information acquired by a reporter when he is acting in his capacity as an ordinary citizen rather than in his professional newsgathering function. At least 16 states, therefore, have chosen to specifically limit legislative safeguards against compelled disclosure to sources of information obtained by a newsman "in the course of his employment" or "while engaged in a newsgathering capacity."[50]

The Nature of the Privilege

Shield laws also vary as to the information privileged from compelled disclosure. States have split over whether the identity of the confidential source should be privileged from divulgence, or if shield laws should protect the content of confidential unpublished information imparted as well. Eleven states privilege "the *source* of any information procured or obtained" by a newsman,

45. Ala. Code tit. 12, § 12-21-142 (1977).
46. Okla. Stat. Ann. tit. 12, § 2506 (West Supp. 1978). Del. Code Ann. tit. 10, § 4320 (1975) is quite specific as to who is a newsman: an individual who "in each of the preceding three weeks or four of the preceding eight weeks had spent at least 20 hours engaged in the practice of obtaining or preparing information for dissemination."
47. Ill. Ann. Stat. ch. 51, § 112 (Smith-Hurd Supp. 1978).
48. Alaska, California, Delaware, Indiana, Louisiana, Michigan, Minnesota, Montana, Nevada, North Dakota, and Oregon.
49. Ind. Code Ann. § 34-3-5-1 (Burns Supp. 1978); Tenn. Code Ann. § 24-113 (Supp. 1978).
50. Alabama, Alaska, Delaware, Illinois, Indiana, Louisiana, Minnesota, Montana, Nevada, New Jersey, New York, North Dakota, Ohio, Oklahoma, Oregon, and Rhode Island. Del. Code Ann. tit. 10, § 4320 (1975) and N.J. Stat. Ann. § 2A:84A-21a (West Supp. 1978) include identical definitions: "'In the course of pursuing his professional activities' means any situation, including a social gathering, in which a reporter obtains information for the purpose of disseminating it to the public, but does not include any situation in which a reporter intentionally conceals from the source the fact that he is a reporter, and does not include any situation in which a reporter is an eyewitness to, or participant in, any act involving physical violence or property damage." Maryland case law has implied this requirement. Lightman v. State, 15 Md. App. 713, 294 A.2d 149, *aff'd* 266 Md. 550, 295 A.2d 212 (1972), *cert. denied*, 411 U.S. 951 (1973). Del. Code Ann. tit. 10, § 4322 (1975) additionally requires an express or implied understanding between the reporter and the source that the information would not be disclosed or that disclosure would hinder the source relationship.

thus privileging only the identity of the informant.[51] Fourteen states, however, have also chosen to privilege the unpublished confidential communication between the reporter and the informant by providing, *"any information* or the *source* of any information procured or obtained" is protected.[52] These states reflect the modern concern that revealing the confidential content of an unpublished communication may lead to the identity of the source or dissuade him from informing again, thus defeating the very purpose behind shield laws. Additionally, although many statutes clearly indicate to the contrary, four states grant protection only to sources whose information is later actually published or disseminated.[53] Another five states merely require that the information at least be procured or used for publication.[54] The apparent rationale behind these nine statutes is that for reporter/source relationships to serve society, the information they produce must reach the public.

The Scope of the Privilege

A third element of the statutory protection given newsmen is the scope of the privilege conferred. A majority of 14 states grant newsmen an absolute privilege of nondisclosure;[55] that is, once a journalist is determined to be within the technical confines of the statute, he has an unqualified right to withhold the privileged information. Generally, a blanket privilege to refuse to disclose the identity of an informant at all times and under all circumstances is given.

Nine states grant only a qualified privilege which may be pre-empted if a court determines that society's interest in a reporter's testimony outweighs the first amendment interest in keeping sources or unpublished information confidential.[56] For example, Minnesota and Tennessee use the test propounded by Justice Stewart in his dissent in *Branzburg* as the standard regulating divestiture of the privilege.[57] Under these two statutes, disclosure may be compelled if (1) the information is clearly relevant to the proceeding; (2) it cannot be obtained through alternative means; and (3) there is a compelling and overriding public interest in the information.[58] The remaining seven states

51. Alabama, Alaska, Arizona, Arkansas, Illinois, Indiana, Kentucky, Louisiana, Maryland, Ohio, and Pennsylvania. Del. Code Ann. tit. 10, § 4320 (1975) indicates third-party sources are not included by the term "source". At least La. Rev. Stat. Ann. § 45:1452 (West Supp. 1978), Minn. Stat. Ann. § 595.023 (West Supp. 1978), and N.J. Stat. Ann. § 2A:84A-21 (West Supp. 1978), however, specifically indicate their statutes envelop sources not directly contacted by newsmen.
52. California, Delaware, Minnesota, Montana, Nebraska, Nevada, New Jersey, New York, North Dakota, Oklahoma, Oregon, Rhode Island, and Tennessee. Mich. Comp. Laws Ann. § 767.5a (1968) simply declares that "communications between reporters . . . and their informants are to be privileged and confidential". Although technically privileging only confidential information, the statute would probably be broadly interpreted to protect the identity of journalistic confidential sources as well. The drafting deficiency results because the Michigan shield provision is part of a general statute also granting the privilege to attorneys, clergymen, and physicians.
53. Alabama, Arkansas, Kentucky, and Maryland.
54. Arizona, California, Nebraska, New York, and Tennessee. However, because not every lead results in a story and because of the subtle issues of intent which must be answered, both limitations appear unfounded.
55. Alabama, Arizona, Delaware, Indiana, Kentucky, Maryland, Michigan, Montana, Nebraska, Nevada, New Jersey, Ohio, Oregon, and Pennsylvania. Del. Code Ann. tit. 10, § 4323 (1975) is unique in that it grants an absolute privilege regarding the identity of the source, but a qualified privilege as to the content of the information. Confidential information may be ordered disclosed if it would not tend to identify the person or means through which the information was obtained and the public interest warrants making the information public.
56. Alaska, Arkansas, Illinois, Louisiana, Minnesota, North Dakota, Oklahoma, Rhode Island, and Tennessee.
57. *Supra* note 31.
58. Minn. Stat. Ann. § 595.024 (West Supp. 1978); Tenn. Code Ann. § 24-113 (Supp. 1978).

use similar but even more general standards for permitting divestiture of the privilege protecting the confidentiality of news sources.[59]

California and New York are unique in that they give newsmen protection from testifying as to their sources in a totally different manner. Both provide immunity to newsmen from being found in contempt of court for refusing to disclose confidential sources and information;[60] they do not create a privilege in a positive sense.[61] This effectively takes away the courts' most potent power of enforcement through contempt citations, but it apparently would not prevent the use of other sanctions for the refusal of a reporter to disclose his sources such as obstruction of justice charges, use of discovery penalties, or directed libel verdicts.[62]

Additional Shield Law Provisions

State shield laws apply to any body having the power to compel testimony or the production of evidence, either from the statutory language itself or through judicial decisions. Courts have broadly interpreted these statutes to extend to any stage of any administrative, legislative and judicial proceeding before any officer.[63] Only a few states establish the mechanics for challenging the assertion of the privilege,[64] since the majority of states that have enacted shield laws grant an absolute privilege against disclosure of a newsman's source of information. Statutes with qualifying circumstances usually contain an application procedure for initiating divestiture of the privilege, while providing

59. Okla. Stat. Ann. tit. 12, § 2506 (West Supp. 1978) requires that "such information or identity is relevant to a significant issue in the action and could not with due diligence be obtained by alternative means." Ill. Ann. Stat. ch. 51, §§ 116, 117 (Smith-Hurd Supp. 1978) permits testimony when there are no alternative sources and the "public interest" is involved and stipulates the considerations which go into such a finding: "the nature of the proceeding, the merits of the claim or defense, the adequacy of the remedy otherwise available, the relevancy of the source, and the availability of other sources." La. Rev. Stat. Ann. § 45:1453 (West Supp. 1978) is even less strict, allowing compelled disclosure simply when it is "essential to the public interest". Alaska Stat. § 09.25.160 (1973) does not allow the withholding of testimony if it would be contrary to the public interest or result in the miscarriage of justice and denial of a fair trial. N.D. Cent. Code § 31-01-06.2 (1976) compels disclosure only when there would be "a miscarriage of justice." R.I. Gen. Laws § 9-19.1-1 (Supp. 1979) provides that for disclosure, the interrogating party must show the information is necessary to permit criminal prosecution of a specific felony or to prevent a threat to human life, and that there are no alternative sources. Ark. Stat. Ann. § 43-917 (1977) is totally different in that it bases the granting of a privilege on the motive and content of a newsman's published articles. For the testimonial privilege to be inapplicable, "it must be shown that such article was written, published or broadcast in bad faith, with malice, and not in the interest of the public welfare."

60. Cal. Evid. Code § 1070 (West Supp. 1979) provides that a newsman "cannot be adjudged in contempt by a judicial, legislative, administrative body, or any other body having the power to issue subpoenas, for refusing to disclose . . . ." N.Y. Civ. Rights Law § 79-h (McKinney 1976) states that no journalist "shall be adjudged in contempt by any court, the legislature or other body having contempt powers, nor shall a grand jury seek to have a journalist or newscaster held in contempt by any court, legislature or other body having contempt powers for refusing or failing to disclose . . . ."

61. *See* Andrews v. Andreoli, 92 Misc. 2d 410, 400 N.Y.S.2d 442 (1977); People v. Monroe, 82 Misc. 2d 850, 370 N.Y.S.2d 1007 (1975); Comment to Cal. Evid. Code §1070 (West Supp. 1979) by California Assembly Committee on the Judiciary.

62. Mont. Rev. Codes Ann. § 93-601-2 (Supp. 1977) combines the privilege and immunity approaches. It provides double protection for journalists against compelled disclosure of sources by both granting an absolute testimonial privilege and also removing the courts' power to penalize an invocation of that privilege.

63. *See, e.g.*, Beecroft v. Point Pleasant Printing & Publishing, 82 N.J. Super. 269, 197 A.2d 416 (1964), which held that shield privileges were applicable to discovery proceedings.

64. Alaska, Illinois, Louisiana, Minnesota, Rhode Island, and Tennessee.

the right of appeal from any order compelling disclosure and an automatic stay of the order pending the appeal. Five states' shield laws deal expressly with waivers of a reporter's privilege not to disclose his news sources.[65]

Additionally, seven states have chosen to make reporters' shield laws inapplicable to defamation actions in which a reporter or news medium is the party defendant.[66] Most of these have merely added the defamation limitation to their already qualified statutes. Practical considerations are apparently present for this exclusion. The Supreme Court in *New York Times v. Sullivan* erected a high threshold of evidence in order to survive a directed verdict in a libel or slander action against the media.[67] In this type of action, the reliability of the source of the disputed publication may well be a pivotal evidentiary point. Thus, a privilege for journalists not to disclose sources or information may well block recovery for defamation in some instances.

State Shield Laws: A Summary

As we have seen, an analysis of the reporters' shield law situation today shows that the statutory protections offered the reporter and his source are uneven, uncertain and not widely available. Among the states, a bare majority of 26 legislatures have granted some sort of protection to journalists' confidential sources, and an analysis shows even this figure is misleading.

One state's shield law has been declared constitutionally invalid.[68] Of the remaining 25 states having shield laws privileging a reporter's sources from being divulged, only 14 actually give newsmen an absolute privilege.[69] Two states offer absolute protection against contempt penalties, but leave open the possibility of other sanctions.[70] Nine statutes grant a qualified privilege[71] —dependent on courts' discretionary senses of justice and public welfare. In a sense, in these nine states the term "shield law" might well be a misnomer when one considers that the asserted reason for enacting shield laws was to take protection of news informants' identities out of the hands of judges. Additionally, the ad hoc nature of these conditional privilege statutes re-establishes the chilling effect by interjecting uncertainty and unpredictability into the confidential relationship.

65. N.J. Stat. Ann. § 2A:84A-29 (West 1976) provides that a newsman's right to the statutory privilege is waived if he voluntarily discloses any part of the privileged material. Or. Rev. Stat. § 44.530 (1977) applies regardless of whether a journalist has disclosed any of the information elsewhere. Mont. Rev. Codes Ann. § 93-601-2 (Supp. 1977) on the other hand, stipulates that "dissemination . . . in whole or in part does not constitute a waiver . . . " of the testimonial privilege. Del. Code Ann. tit. 10, § 4325 (1975) states that a reporter may be cross-examined only on the facts which he has waived by disclosure. R.I. Gen. Laws § 9-19.1-3 (Supp. 1979) has a similar provision that the privilege does not apply to any information which has been made public by the person claiming the privilege.
66. Illinois, Louisiana, Minnesota, Oklahoma, Oregon, Rhode Island, and Tennessee. La. Rev. Stat. Ann. § 45:1454 (West Supp. 1978) provides that in defamation actions in which the defense is based on a confidential source of information, the reporter or news medium has the burden of proof to sustain a defense of good faith. Minn. Stat. Ann. § 595.024 (West Supp. 1978) states that the confidential source must be relevant to the issue of defamation and the information cannot be obtained by any alternate means less destructive of first amendment rights. R.I. Gen. Laws § 9-19.1-2 (Supp. 1979) also excludes proceedings regarded to be secret from statutory protection, such as grand juries.
67. *See* note 23 *supra*. The court held that a public official could not recover damages in a civil action for libel unless he could prove actual malice.
68. New Mexico. *See* note 33 *supra*.
69. *See* note 55 *supra*.
70. *See* notes 60 and 61 *supra* and accompanying text.
71. *See* note 56 *supra*.

Further analysis shows that in the 14 states which provide an absolute privilege, only six apply the privilege both to the source of information and the information itself.[72] Seven states apply the privilege to the protection only of sources,[73] and one state specifically applies it only to the information itself.[74] Of the six states which do provide a strong extensive privilege, Oregon does not allow the privilege to be asserted in defamation proceedings.

Not all news personnel are protected by the statutory privileges. Many state statutes restrict their protection only to certain specified media, while nine states expressly include only the professional press.[75] Some legislatures have not extended protection to former newsmen, freelancers, confidential information which was not a basis for a disseminated story, information which was obtained when the journalist was not expressly acting in his professional capacity, or sources whose confidential information has been partially disclosed. In short, a testimonial privilege in favor of newsmen in the 50 states and federal courts is as much the exception today as the rule, and even in the jurisdictions where available, the privilege granted may be quite limited.

THE JUDICIARY'S RESPONSE TO SHIELD LAWS

Judicial decisions applying shield laws have had as important an effect in determining the legislative testimonial privilege available to newsmen as the statutory provisions themselves. Traditionally unhappy about evidentiary privileges which limit judicial access to information, courts have tended to construe shield laws narrowly[76] thus eroding the already frail testimonial privilege available to journalists. Judicial decisions are replete with instances of implied statutory waiver[77] and restrictive definitions of "news media"[78] and "sources."[79] Courts have placed the burden on newsmen to establish that they fall under the statutory privilege.[80] They have held that shield laws afford protection only when the information is received under a strictly construed and obvious cloak

72. Delaware, Montana, Nebraska, Nevada, New Jersey, and Oregon.
73. Alabama, Arizona, Indiana, Kentucky, Maryland, Ohio and Pennsylvania.
74. Michigan. Although the shield law could be interpreted to apply to sources as well. *See* note 52 *supra*.
75. *See* note 43 *supra*.
76. Courts rested such holdings on the belief that shield laws, as obstacles to the administration of justice and the search for truth in derogation of common law, should not be construed broader than absolutely required. *See, e.g.*, Lightman v. State, 15 Md. App. 713, 294 A.2d *aff'd* 266 Md. 550, 295 A.2d 212 (1972), *cert. denied*, 411 U.S. 951 (1973); Beecroft v. Point Pleasant Printing and Publishing, 82 N.J. Super. 269, 197 A.2d 416 (1964); Andrews v. Andreoli, 92 Misc. 2d 410, 400 N.Y.S.2d 442 (1977). *But, contra, In re* Taylor, 412 Pa. 32, 193 A.2d 181 (1963); *Ex parte* Howard, 136 Cal. App. 2d 816, 289 P.2d 537 (1955).
77. *See, e.g., In re* Bridge, 120 N.J. Super. 460, 295 A.2d 3, *aff'd* 62 N.J. 80, 299 A.2d 78 (1972), *cert. denied*, 410 U.S. 991 (1973), in which statutory protection was held waived merely by disclosure of any part of the privileged material; Brogan v. Passaic Daily News, 22 N.J. 139, 123 A.2d 473 (1956) in which the court held that a newspaper had waived its statutory privilege in a libel suit when the defense it set forth was good faith and fair comment.
78. *See, e.g.*, Deltec, Inc. v. Dun & Bradstreet, Inc., 187 F. Supp. 788 (N.D. Ohio 1960), in which bimonthly financial report was held not a newspaper within the statutory meaning; *In re* Cepeda, 233 F. Supp. 465 (S.D.N.Y. 1964), in which the court ruled the use of the term "newspaper" in the statute was not comprehensive and thereby excluded magazines from the shield of the statute.
79. *See, e.g.*, State v. Donovan, 129 N.J. 478, 30 A.2d 421 (1943), in which a statute privileging the source of information was held not to protect the name of a messenger who delivered an article; State v. Sheridan, 248 Md. 320, 236 A.2d 18 (1967), in which the privilege of the "source of any news or information" was held not to include the "news or information" itself; Branzburg v. Pound, 461 S.W.2d 345 (Ky. 1971), *aff'd* 408 U.S. 665 (1972), in which the court held that where a newsman personally observes persons committing criminal activities, the newsman and not the persons observed is the "source" of the news or information in the sense contemplated by statute.
80. *See, e.g.*, People v. Wolf, 69 Misc. 2d 256, 329 N.Y.S.2d 291, *aff'd* 39 A.D. 2d 864, 333 N.Y.S.2d 299 (1972).

of confidentiality.[81] Through such rigid interpretations, courts continue to successfully circumvent legislative intent and curtail shield law protection.[82] Although the statutory privilege granted by legislatures to newsmen in shield statutes has often been circumvented by the judiciary, the constitutionality of the privilege was rarely questioned and never denied.[83] Recent state court decisions indicate, however, that an absolute shield for reporters may, in certain settings, be constitutionally suspect. In both the sixth amendment[84] and the separation of powers[85] areas, the continued vitality of state shield laws has been drawn into question.

The very concept of shield law legislation and its application to the courtroom has been found unconstitutional in New Mexico under the separation of powers principle as an invasion of the judiciary's constitutionally defined sphere of power. In *Ammerman v. Hubbard Broadcasting, Inc.*,[86] a reporter refused to disclose his sources in a civil action for libel, citing New Mexico's shield statute. Although the statute was qualified and substantially discretionary on the part of the court since it permitted disclosure whenever "essential to prevent injustice," the New Mexico Supreme Court determined the state shield law to be a rule of evidence and therefore procedural in nature and a part of the judicial machinery for resolving substantive rights. As such, the statute was an unconstitutional encroachment on the state judiciary's exclusive authority over rules of pleading, practice, and procedure.[87]

Although first glance indicates that such a fundamental constitutional infirmity would seem to leave no room for a legislative testimonial privilege for reporters, closer scrutiny of the opinion reveals a much more circumscribed if not negligible impact on shield law legislation. Unlike New Mexico, many state constitutions do not empower the judiciary with exclusive rulemaking power over court procedure.[88] Even in those that do, legislatively created procedural rules are not unconstitutional per se, but may be enforced by the judiciary out of respect for the actions of a co-equal branch,[89] as other state courts with constitutions similar to New Mexico's have done. Additionally, the line between substance and procedure is hazy,[90] particularly in classifying testimonial privileges. The New Mexico court may have been too hasty in

81. *See, e.g.*, People v. Dupree, 88 Misc. 2d 791, 388 N.Y.S.2d 1000 (1976), in which material obtained by a newsman was held not to be intended by the informant to be confidential; *In re* WBAI-FM, 68 Misc. 2d 355, 326 N.Y.S.2d 434 (1971), in which the court found the contents of a letter made available to the public by a radio station to have no cloak of confidentiality.
82. Judicial hostility toward reporters' shield laws as evidenced by narrow construction continues to the present. Just recently a Montana court held that although reporters are protected by the state's shield statute, news organizations such as the Associated Press are not. Quill, November 1978, at 6.
83. The only case to raise a constitutional issue until the 1970's was *Ex parte* Sparrow, 14 F.R.D. 351 (N.D. Ala. 1953). The court ruled that Alabama's shield law was not unconstitutional when measured by the test of the fourteenth amendment.
84. "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the Witness against him; to have compulsory process for obtaining witnesses in his favor . . . " U.S. Const. amend. VI.
85. Under the separation of powers concept, no branch of government is constitutionally permitted to exercise power in a sphere belonging to another or to interfere with the others' administration of powers so as to impair its basic function in the constitutional scheme. 66 Geo. L.J., *supra* note 18, at 1279.
86. 89 N.M. 307, 551 P.2d 1354 (1976).
87. *Id.* at 309-310, 551 P.2d at 1356-57.
88. There are generally three variations among states as to the delegation of rule-making authority. Some states give the judiciary exclusive rule-making power, while others grant the power subject to legislative modification or annulment. Other states grant the legislature power to regulate constitutional procedure. 66 Geo. L.J., *supra* note 18, at 1280-1281, n. 45, 48.
89. *Id.* at 1281.
90. *See, e.g.*, Erie Railroad Co. v. Tomkins, 304 U.S. 64 (1938); Guaranty Trust Co. v. York, 326 U.S. 99 (1945).

labeling privilege statutes procedural, for at least one commentator, after a thorough analysis, has convincingly argued that shield laws, while having some procedural effects, are basically substantive in nature.[91]

A less sweeping but more serious challenge to shield laws has been mounted by California courts under the second provision of the separation of powers doctrine, *i.e.*, the prohibition against impinging upon another branch of government's basic functional integrity. In *Farr v. Superior Court*[92] a California journalist was cited for contempt for refusing to disclose the source of a statement released in violation of a court-imposed gag order to guarantee a fair trial during the Manson murder proceedings. The citation was enforced despite California's shield law which specifically prohibited contempt citations of newsmen who refused to disclose their confidential sources or information. The appellate court, in upholding the contempt conviction, disagreed with the reporter's assertion that the California shield law protected the confidentiality of his news sources. The court held that the shield law granting immunity from contempt in such a situation was "an unconstitutional interference by the legislative branch with an inherent and vital power of the court to control its own proceedings and officers," and was therefore invalid as a violation of the separation of powers doctrine.[93]

The *Farr* decision was further defined in the subsequent California decision of *Rosato v. Superior Court.*[94] The case again involved a contempt citation against a reporter for failing to answer questions during an investigation of the violation of a judicial gag order designed to protect a criminal defendant's constitutional right to a fair trial. Quoting extensively from the *Farr* opinion, the court again reaffirmed the inherent constitutional power of the judiciary to control the conduct of those subjected to a gag order, but indicated that California's absolute immunity statute, rather than being totally invalid, was merely constitutionally circumscribed. The *Rosato* court additionally limited the *Farr* decision by holding that the judiciary's inherent power to compel disclosure of sources extended only to court officers.

These California decisions regarding shield laws are particularly significant because they not only appear to be valid constitutional objections to legislative limitations on an essential judicial power, but also raise questions as to their application to more conventional shield laws. Statutes granting a true privilege to newsmen not to reveal their sources appear to be subject to the same constitutional defect of hampering judicial investigations, thus similarly encroaching on a court's inherent constitutional power to protect the integrity of its own processes.

91. 66 Geo. L.J., *supra* note 18, at 1283-1285. A substantive right, which is independent of court proceedings, is created and defined on behalf of the reporter, although it has an incidental effect on those proceedings.
92. 22 Cal. App. 3d 60, 99 Cal. Rptr. 342 (1971), *cert. denied* 409 U.S. 1011 (1972). People v. Monroe, 82 Misc. 2d 850, 370 N.Y.S.2d 1007 (1975), decided on other grounds, later cited Farr and suggested that New York's shield law, which also restricted the use of the contempt power against news reporters, might violate the separation of powers.
93. *Id.* at 69, 99 Cal. Rptr. at 348. Farr was also unusual in that first amendment interest in the free flow of information was missing, while conversely there was a sixth amendment fair trial interest in keeping the information secret.
94. 51 Cal. App. 3rd 190, 124 Cal. Rptr. 427 (1975), *cert. denied.* 427 U.S. 912 (1976).

The recent *Farber* case represents the leading decision in the conflict between shield statutes and sixth amendment guarantees.[95] In their decision affirming Farber's contempt convictions for refusing to turn over notes relating to his sources in a criminal trial, the New Jersey Supreme Court rejected the protections afforded Farber by the New Jersey Newspaperman's Privilege Law, which it characterized as one "as strongly worded as any in the country."[96] Notwithstanding the intent and purpose of the New Jersey statute, the court ruled that the shield law must give way to a defendant's sixth amendment right to a fair and impartial trial.[97]

In holding that this constitutional provision guarantees criminal defendants the right to compel attendance of witnesses and production of documents, the court did acknowledge its obligation to give as much effect as possible to the legislature's purpose of establishing a strong testimonial privilege for newsmen.[98] The court prescribed the imposition of safeguards which required strict showings "that there was a reasonable probability or likelihood that the information sought by the subpoena was material and relevant to the defense, that it could not be secured from any less intrusive source, and that the defendant had a legitimate need to see and otherwise use it" before disclosure could be ordered.[99] In camera inspection could be used as a procedural tool in this determination.

The resolution in *Farber* of the conflict between shield laws and the sixth amendment certainly indicates there may be additional constitutional restraints on shield law legislation.[100] Much as the judiciary has the duty and authority

95. *See* note 1 *supra*. The case grew out of a series of articles which New York Times reporter Myron Farber wrote in early 1976 about 13 mysterious deaths involving a "Dr. X" that had occurred 10 years before in a New Jersey hospital. Farber's information prompted authorities to reopen the investigation and eventually indict Dr. Mario E. Jascalevich on murder charges. The doctor's defense lawyer demanded to see Farber's notes, insisting they were vital to his case, but Farber refused, citing the first amendment and the New Jersey shield law that gave reporters an absolute privilege to keep their sources and unpublished information confidential. A New Jersey judge asked to see the notes in private to determine their relevancy, but Farber still refused. Farber was cited for contempt and imprisoned. 78 N.J. at 263-264, 278-281, 394 A.2d at 332, 339-340.

In an earlier case, U.S. v. Homer, 411 F. Supp. 972 (W.D. Pa.), *aff'd* 545 F.2d 864 (3d Cir. 1976), *cert. denied* 431 U.S. 954 (1977), a federal district court had simply stated without further comment that Pennsylvania's Newspaper Reporters Privilege Act should not be permitted to stand in the way where the inquiry goes to the heart of the matter in a criminal case in federal court. The material sought to be disclosed was found to be irrelevant and immaterial to the case.

The Rosato decision also commented that "any doctrinal tension between the First Amendment and the Sixth Amendment resulting in an impasse must be resolved in favor of the relatively unrestricted constitutional right to a fair trial rather than in favor of the relatively limited invasion on freedom of the press caused by the necessity of revealing a relatively restricted category of news sources." 51 Cal. App. 3d at 223, 124 Cal. Rptr. at 449. *Contra,* Shindler v. State, 49 Ind. Dec. 182, 335 N.E. 2d 638 (1975). "The State does not have the right, in the face of the [shield] statute, to require [the reporter] to give [criminal defendants] the names of . . . sources." *Id.* at 192, 335 N.E.2d at 646.

96. 78 N.J. at 270, 394 A.2d at 335.

97. *Id.* at 271-272, 394 A.2d at 336. "The Federal and State Constitutions each provide that in all criminal prosecutions the accused shall have the right 'to have compulsory process for obtaining witnesses in his favor.' Dr. Jascalevich seeks to obtain evidence to use in preparing and presenting his defense in the ongoing criminal trial . . . [W]hen faced with the Shield Law, he invokes the rather elementary but entirely sound proposition that where Constitution and statute collide, the latter must yield . . . . We find this argument unassailable." *Id.*

98. *Id.* at 270, 394 A.2d at 335.

99. *Id.* at 276-277, 394 A.2d at 338.

100. The Farber precedent has already been bolstered. In Hammarley v. Superior Court, 89 Cal. App. 3rd 388, __ Cal. Rptr. __ (1979), the California Court of Appeals, in a factual situation reminiscent of Farber, upheld a contempt citation against reporter John Hammarley of the *Los Angeles Herald Examiner* for refusing to turn over his subpoenaed notes and tapes relating to a murder trial for in camera inspection. The court ruled that although all unpublished information obtained from a news source was privileged by the state's shield law, in the circumstances before it, the statute's first amendement interests were present only as "an abstraction", and thus had to give way to the defendant's Sixth Amendment right to compulsory process of all relevant and otherwise unavailable information necessary for a fair trial. The case is now on appeal.

to protect its own constitutionally ordained role as in *Farr,* it has the obligation and power to protect the rights and interests of individual citizens as well. Despite the constitutional limitations suggested by the New Jersey and California decisions, however, shield law legislation has still emerged as a proper, viable and constitutional instrument for establishing a testimonial privilege for newsmen.

SHIELD LAW LEGISLATION: TOWARD A MORE HOPEFUL FUTURE

In spite of their own inherent weaknesses, an unfriendly reception by the judiciary, and constitutional restraints, shield laws remain of paramount importance to the efforts of newsmen to gain a testimonial privilege regarding their confidential sources. Outside of scattered and limited judicial protection in non-criminal proceedings,[101] shield statutes offer the only significant basis for a privilege in favor of journalists today. In retrospect, there is much to indicate that the judiciary has been unjustifiably hostile and suspicious in refusing to implement the policy judgment of the legislature as embodied in shield laws. Courts have apparently failed to consider a number of salient points relating to shield laws.

First, shield laws are the product of a co-equal branch of the tripartite governmental structure and must be respected as such. The creation of an absolute privilege involves a policy judgment by the legislature that the public interest in the free flow of information outweighs all other competing interests and rights. Under the separation of powers principle, courts should respect and implement legislative judgments to the maximum extent possible unless a constitutional standard clearly conflicts. Only then, with great hesitation and reluctance, and after exhausting other possible alternatives, should the judiciary invalidate an act of the legislature. Failure to implement legislative intent results in policymaking by courts, a function beyond the constitutional power of the judiciary.

Secondly, the pre-eminence of the first amendment within our constitutional scheme mandates much stronger judicial support for a statutory testimonial privilege for the press. The fundamental rationale behind the passage of shield laws is to effectively extend first amendment newsgathering protection to a reporter's confidential sources, which courts have failed to do under federal and state constitutions.[102] As noted earlier, five of nine justices in *Branzburg* believed a newsman's sources were afforded protection under the first amendment, although Justice Powell did not believe it controlled in the instant grand jury situation.[103] Some lower courts, in spite of *Branzburg,* have recognized limited constitutional protection of news source identities in civil proceedings.[104] The fact that legislatures are attempting to expand a fundamental

101. Lower courts have increasingly limited the force of Branzburg by recognizing a first amendment interest in the nondisclosure of a journalist's confidential sources, and, at least in civil cases, often found that countervailing interests were not enough to overcome the qualified first amendment privilege. *See e.g.,* Baker v. F & F Investment, 470 F.2d 778 (2d Cir. 1972), *cert. denied,* 411 U.S. 966 (1973); Democratic National Committee v. McCord, 356 F. Supp. 1394 (D.D.C. 1973); Apicella v. McNeil Laboratories, 66 F.R.D. 78 (E.D.N.Y. 1975).

102. *See, e.g.,* Neb. Rev. Stat. § 20-144 (1977) "The Legislature finds: . . . That [this act] is necessary to ensure the free flow of information and to implement the first and fourth amendments and Article I, section 8, of the United States Constitution, and the Nebraska Constitution."

103. Even Justice White, writing for the majority, apparently believed the proposition had enough merit to invite state legislatures, state courts, and Congress to make their own determinations. 408 U.S. at 693. *See* note 28 *supra.*

104. *Supra* note 101.

constitutional right by statute suggests that courts would begin with a presumption of a first amendment privilege and then entertain justification for denying it, rather than the opposite method now being employed.[105]

The reporter-source relationship also fits the classic test for privileges which, by their very nature, limit the search for truth and result in injustice, yet are deemed necessary in the best interest of society.[106] *Branzburg* itself reaffirmed "the long-standing principle that the public . . . has a right to every man's evidence', *except for those persons protected by a* constitutional, common law, or *statutory privilege.*"[107] The Court only denied a constitutional privilege; it did not invalidate a statutory one. In fact, it openly suggested a statutory testimonial privilege for newsmen. Privileges are specific exceptions to the sixth amendment's power to compel testimony as well. Compulsory process has never been absolute. The fourth and fifth amendment as well as statutory and common law privileges, already circumscribe the duty to testify in criminal trials. These amendments are absolute and are not balanced against constitutional rights. Unless only shield laws for journalists are destined to be overcome by the sixth amendment, the legislature's judgment, that the confidentiality of news sources promoting freedom of information is more important to the proper functioning of society and the public welfare than the ability of criminal defendants to gain access to all sources of information, should be honored.[108]

Lastly, additional grounds have recently emerged which lend credence to the extension of protection to confidential sources by legislatures. Newsmen have increasingly complained that they are being subpoenaed before grand juries for use as an investigative arm of the government or as a means for discovering the identity of, and retaliating against, politically embarrassing sources.[109] Justices White and Powell both cautioned that harassment of the press through the use of judicial subpoenas would not be tolerated.[110] Increasing indications of harassment may well influence future cases. In addition, public support for protection of a newsman's source has grown, not diminished, since the *Branzburg* decision.[111] Although most states had not enacted shield laws at the time *Branzburg* was decided, a factor duly noted by the Court, a majority of state legislatures have now granted newsmen an evidentiary privilege.[112] Additionally, the Supreme Court's refusal to recognize a testimonial

105. *See also,* Guest and Stanzler, *supra* note 18, at 38.
106. Privileges, whether statutory or common law, are recognized because confidentiality is essential to the maintenance of the relationship between the two parties, and the prospective injury to that relationship from compelled disclosure outweighs the consequent public benefit in the ascertainment of truth. This applies equally to the reporter-source relationship.
107. 408 U.S. at 688 (emphasis added).
108. Another alternative might be to simply dismiss the charges against a criminal defendant when a confidential source is vital to his defense, thus protecting the sixth amendment rights of the accused while rendering proper respect to the legislatures' policy decision as well.
109. *Time,* October 30, 1978 at 66. The Washington-based Reporter's Committee for Freedom of the Press estimated that in the period 1960-1969 only about 12 reporters were subpoenaed, while approximately 150 were subpoenaed in 1969-1970, and over 500 in the period from 1970-1976 after which subpoenas became too numerous to count. Telephone interview with Brona Pinnolis, Reporter's Committee for Freedom of the Press (Nov. 1, 1978). The high number of subpoenas in 1969-'70 was the result of the Nixon Administration's vigorous prosecution of left-wing anti-war activists about whom newsmen had collected much information in the process of reporting the news. 24 U.C.L.A. L. Rev., *supra* note 8, at 162. Ironically, if reporters become perceived as extensions of the government by their sources, the net effect will be their becoming of little use to law enforcement.
110. 408 U.S. at 707-710.
111. A fall 1978 Gallup poll indicates that Americans now support a reporter's right to protect his confidential sources by a margin of three to one, an increase over similar surveys in 1972 and 1973. Gallop Opinion Index, 163, Feb. 1979.
112. 408 U.S. at 689.

privilege for newsmen and the increasing use of contempt penalties have not been successful in forcing most reporters to divulge their confidential sources.

It is doubtful whether these considerations carry enough weight to override other conflicting constitutional interests and cause the Supreme Court to uphold absolute shield laws for reporters. *Branzburg* indicates that there is no consistent view of the first amendment embraced by a clear majority of the present Court. With such significant factors in its favor, however, shield law legislation should hopefully receive increased judicial support in the future.

CONCLUSION

Legislatures today provide very little protection to the newsman trying to protect the confidentiality of his sources. Only a bare majority of states have shield provisions; the trend toward more states enacting such statutes appears to have ended about two years after *Branzburg*. Federal law provides no privilege against disclosure of confidential sources for newsmen, and the possibility of future federal legislation is unpredictable at best. Poor draftsmanship, qualifications within the statutes themselves, and narrow judicial construction effectively limit the privilege shield laws offer and create uncertainty and unpredictability for informants in their confidentiality. Recent court decisions rejecting the privilege on constitutional grounds have challenged even the ability of legislative bodies to provide an absolute testimonial privilege. A tremendous amount of uncertainty exists as to how much protection legislatures actually can afford confidential news sources. It is clear, however, that in light of an express legislative policy to protect confidential sources, the judiciary should give the maximum effect possible to statutory testimonial privileges for reporters. With such an approach, all constitutionally-based interests—first amendment, sixth amendment, and separation of powers—would receive fuller implementation.

If Congress and the states wish to establish a privilege for newsmen, they should continue to strive to enact strong, well-drafted shield laws. At a minimum, legislatures can still eliminate much of the problematic judicial discretion that gave rise to shield laws in the first place. Stringent substantive and procedural safeguards such as providing for prior adversary judicial proceedings before the privilege can be divested, requiring a determination that disclosure of the confidential source be critical to the outcome of the proceeding, placing the burden of proof that the evidence is not available elsewhere on the party seeking to overcome the claim of a privilege, allowing interlocutory appeals from disclosure orders, and permitting stays of compelled disclosure pending appeal can be implemented to protect confidential sources. Additionally, when no overriding constitutional rights are confronted, but merely the interest in the fair administration of justice is present, an absolute privilege against testifying can apparently still be granted. Even under the latest decisions adverse to shield law legislation, the opportunity for legislatures to protect newsmen from compelled disclosure of their confidential sources remains quite extensive. Whether they choose to exercise this ability remains an open question.

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